

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:
Paxson Communications Corporation
v.
DIRECTV, Inc.
Motion for Stay
CSR-5731-M

MEMORANDUM OPINION AND ORDER

Adopted: June 7, 2002

Released: June 10, 2002

By the Deputy Chief, Media Bureau:

I. INTRODUCTION

1. Before us is DIRECTV, Inc.'s Motion for Stay of the former Cable Services Bureau's decision granting the must carry complaint filed by Paxson Communications Corporation ("Paxson"), licensee of 36 full-power commercial television stations operating in 31 designated market areas. DIRECTV seeks a stay pending resolution of its Application for Review of that decision. Paxson filed an Opposition to DIRECTV's Motion. For the reasons discussed below, we deny the Motion for Stay.

II. BACKGROUND

2. In a Memorandum Opinion and Order ("MO&O") released on January 14, 2002, the Bureau, acting under delegated authority, granted Paxson's must carry complaint against DIRECTV. Paxson filed a complaint pursuant to Section 338 of the Communications Act of 1934, as amended by the Satellite Home Viewer Improvement Act of 1999, and Section 76.66 of the Commission's rules for DIRECTV's refusal to carry Paxson's television broadcast signal on its satellite system. DIRECTV did not respond in terms of whether Paxson's stations were qualified for carriage under the Act and the

1 See DIRECTV Motion for Stay in CSR No. 5731-M (filed May 16, 2002) ("Motion").

2 The Commission recently consolidated the former Cable Services Bureau and Mass Media Bureau into a single Bureau, now known as the Media Bureau.

3 See Paxson Communications Corporation, CSR-5731-M, Memorandum Opinion and Order, 17 FCC Rcd 834 (CSB 2002) ("MO&O").

4 See DIRECTV Application for Review in CSR No. 5731-M (filed Feb. 7, 2002).

5 See Paxson Opposition to Motion for Stay in CSR No. 5731-M (filed May 23, 2002) ("Opposition").

6 See 47 U.S.C. § 338; 47 C.F.R. § 76.66.

Commission's rules. Instead, DIRECTV insisted that, pursuant to an April 27, 2002 "Letter Agreement," Paxson could not seek mandatory carriage because it had contractually granted retransmission consent and agreed not to seek mandatory carriage during the term of the agreement.

3. In the *MO&O*, the Bureau concluded that, while disputes as to the terms of the private Letter Agreement between the parties are contractual matters for the parties or the courts to resolve, in terms of the Commission's rules for carriage elections, Paxson had made a valid election for mandatory carriage for the stations.<sup>7</sup> Although the Letter Agreement could be considered an interim consent for retransmission consent, the Bureau did not find that the agreement constituted an election of retransmission consent in lieu of must carry.<sup>8</sup> The Bureau noted that, at the time in which the Letter Agreement was signed, the procedures for stations to elect between mandatory carriage and retransmission consent were not in effect.<sup>9</sup> Before the July 1, 2001 deadline for carriage elections, Paxson followed the Commission's carriage election procedures and made its request for mandatory carriage for the subject stations.<sup>10</sup> Accordingly, the Bureau ordered DIRECTV to carry the subject stations.<sup>11</sup> DIRECTV has now requested that we stay the *MO&O* until the Commission acts on its pending Application for Review.

### III. DISCUSSION

4. The Commission evaluates requests for stay under well-settled principles. To support a stay, a petitioner must demonstrate that: (1) it is likely to prevail on the merits; (2) it will suffer irreparable harm if a stay is not granted; (3) other interested parties will not be harmed if the stay is granted; and (4) the public interest favors granting a stay.<sup>12</sup> The Commission also recognizes that, although the likelihood of success on the merits is an important element in a petitioner's showing, a request for stay may also be granted if the petitioner makes a strong showing on the other three factors.<sup>13</sup>

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<sup>7</sup> See *MO&O*, 17 FCC Rcd at 838. Our review of the Letter Agreement was expressly limited to the necessary determination that although retransmission consent was granted, the Letter Agreement did not appear to constitute an election of retransmission consent over mandatory carriage for purposes of the Commission's rules. Our review stopped short of determining whether such an election would have been inconsistent with the terms of the contract, as that is a question beyond the scope of this matter. See *id.*

<sup>8</sup> See *id.* at 839

<sup>9</sup> See *id.*

<sup>10</sup> See *id.*

<sup>11</sup> As DIRECTV noted in its Motion (at 1), its carriage obligation under the *MO&O* was extended to June 14, 2002, pursuant to mutual agreement by the parties and with consent from the Commission. The parties requested this extension in an effort to negotiate a resolution of their dispute.

<sup>12</sup> See *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) (per curiam) (setting forth the requirements for stay), as modified by, *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). See also *Implementation of Video Description of Video Programming*, Order, 17 FCC Rcd 6175 (2002) ("*Video Description Order*") (noting that, when considering a motion for stay, the Commission applies the four-part test set forth in *Virginia Jobbers Ass'n*, subsequently modified by *Washington Metropolitan Area Transit Comm'n*); *Brunson Communications, Inc.*, CSR-5496-M, Motion for Stay, 15 FCC Rcd 12,883 (CSB 2000) (applying the four-part test).

<sup>13</sup> See *Brunson Communications*, 15 FCC Rcd at 12,883-884.

5. As to the first factor, DIRECTV contends that it is likely to prevail on the merits.<sup>14</sup> DIRECTV argues that, as a procedural matter, the Bureau lacked jurisdiction to consider Paxson's complaint because the exclusive remedy for the failure of a satellite carrier to meet its carriage obligations under Section 338(a)(1) of the Act is a civil action in federal district court, and that, on the merits, the Bureau incorrectly concluded that Paxson was permitted to elect mandatory carriage notwithstanding the existence of the Letter Agreement.<sup>15</sup> Paxson responds that DIRECTV's procedural argument was properly disposed of by the Bureau and is nothing more than a "red herring."<sup>16</sup> Further, Paxson argues that the Bureau examined the context in which the parties executed the Letter Agreement in considering the merits of its carriage complaint and correctly determined that Paxson did not waive its must carry rights.<sup>17</sup> After considering the arguments on this factor, we conclude that DIRECTV has not shown that it will likely prevail on the merits. It has neither made a strong showing that it is likely to prevail on appeal nor a substantial case on the merits. As Paxson points out,<sup>18</sup> and we agree, DIRECTV offers no new legal arguments or other basis to satisfy the first factor.<sup>19</sup>

6. As noted above, a party may still be granted a stay if it makes a strong showing with respect to the other factors of the stay test. Even after an evaluation of the stay request under the three remaining factors, however, we further conclude that DIRECTV has not shown that the scales tip in its favor. DIRECTV has not sufficiently established that it will be irreparably harmed absent a stay. It contends that it will incur significant monetary losses, estimated at over two million dollars, associated with the carriage of the stations.<sup>20</sup> It claims that it will incur costs for installations, for having to modify contracted roof rights to add antennas and masts in several cities, and possibly for securing additional telecommunications circuits. Further, it argues that mandatory carriage will force it to utilize satellite capacity that otherwise could be used for national programming or other services. Paxson counters that the harm alleged by DIRECTV "will not threaten its ability to continue as a going concern, as compliance costs of \$2 million are unlikely to even make a dent in DIRECTV's financial results."<sup>21</sup> It states that "[t]he economic marketplace has valued Hughes Electronics, the corporate parent of DIRECTV, at over \$25 billion."<sup>22</sup> We find that DIRECTV has fallen short of showing that its injury is "both clear and great"

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<sup>14</sup> See Motion at 9-10.

<sup>15</sup> See *id.* at 6-11.

<sup>16</sup> See Opposition at 6-7.

<sup>17</sup> See *id.* at 7-11.

<sup>18</sup> See *id.* at 2.

<sup>19</sup> See, e.g., *Cablevision Systems Corporation*, CSR-3873-A, Memorandum Opinion and Order, 11 FCC Rcd 12,669 (1996) ("*Cablevision*") (Petitioner failed to satisfy first factor of test because Petitioner did not raise any new legal arguments).

<sup>20</sup> See Motion at 12-15. DIRECTV cites our decision in *Brunson Communications* to support its arguments under this factor. See *id.* at 14-15. In *Brunson Communications*, cited *supra*, the Bureau stayed the effectiveness of a channel positioning order in which RCN estimated that repositioning the station's channel position from 12 to 48 would cost \$357,068, which as Paxson points out (Opposition at 21) was an amount that was roughly comparable to RCN's monthly losses during the prior 18 months. The significant difference in the size and revenues of RCN versus that of DIRECTV, the difference in the potential costs incurred by both entities absent a stay, and consideration of other equities and distinct factual circumstances considered do not warrant the same result.

<sup>21</sup> Opposition at 12.

<sup>22</sup> *Id.*

or that the purported economic loss would threaten the operation of its business.<sup>23</sup> Furthermore, the costs that DIRECTV specifies are not exceptional costs; rather, they constitute the normal costs associated with carrying local stations. While there certainly will be costs associated with carrying the subject stations, DIRECTV has failed to demonstrate that those costs rise to the level of an irreparable injury sufficient to justify a stay. To the extent DIRECTV believes that these expenses are the result of Paxson not following the terms of the contract between the parties, DIRECTV has not even attempted to demonstrate that the alleged expense would not be repairable through a judicial contract enforcement process.

7. With respect to the third factor, DIRECTV contends that granting a stay will not substantially harm Paxson. DIRECTV points out that, since April 29, 2000, it has carried, and continues to carry, Paxson's programming in the relevant markets via the PAX TV national feed, and that PAX TV is comprised of programming substantially identical to the programming carried on the local stations' signals.<sup>24</sup> Paxson responds that while DIRECTV subscribers can access the national PAX TV feed, non-carriage of its stations prevents local subscribers from gaining access to any of the local programming broadcast by the stations.<sup>25</sup> Further, Paxson argues that its stations will sustain substantial costs in terms of the loss of local audiences, ratings, and advertising revenue.<sup>26</sup> Thus, Paxson continues, "any further delay in the launch of the Stations would pose substantial harm to Paxson and the Stations."<sup>27</sup> On this factor, we agree with DIRECTV that the harm to Paxson may be mitigated to some extent by DIRECTV's continued carriage of the PAX TV national feed. This, however, does not appear to be a complete response to its failure to carry the specific local stations involved which Section 338 presumes will be a direct injury to the stations involved.

8. The fourth factor in the stay test is whether a stay would serve the public interest. We find that the public interest considerations that DIRECTV raise do not support granting a stay. DIRECTV argues that maintaining the status quo will have little impact on consumers because DIRECTV currently carries the PAX TV national feed.<sup>28</sup> It further argues that its subscribers are likely to be confused by the shift in channel assignment that will result from the enforcement of the *MO&O* pending resolution of its Application for Review.<sup>29</sup> The Commission has in other contexts, involving cable television mandatory carriage requirements, concluded that arguments of this type did not justify a stay even when channel shifts throughout the industry were potentially involved.<sup>30</sup> Under the circumstances presented, DIRECTV has failed to demonstrate that a stay would serve the public interest, and certainly has not done so in a sufficiently compelling way to justify the extraordinary relief of a stay.

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<sup>23</sup> *Video Description Order*, 17 FCC Rcd at 6178 (citations omitted).

<sup>24</sup> *See Motion* at 15.

<sup>25</sup> *See Opposition* at 17.

<sup>26</sup> *See id.* at 18.

<sup>27</sup> *Id.*

<sup>28</sup> *See Motion* at 16.

<sup>29</sup> *See id.*

<sup>30</sup> *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Order, 8 FCC Rcd 3938 (1993) (Commission denied motion for stay of its new carriage rules pending resolution of a petition for reconsideration, holding that a stay was not warranted even though the public might suffer industry-wide disruption and confusion resulting from multiple channel additions, deletions, and other line-up changes in less than a year). *See also Cablevision*, 11 FCC Rcd at 12,675.

9. Although the Motion for Stay is being denied, we emphasize that neither this action nor the underlying *MO&O* were or are intended to suggest any opinion as to whether Paxson's assertion of carriage rights before the Commission are consistent with any contractual agreement between it and DIRECTV. Contrary to the suggestion in DIRECTV's Application for Review,<sup>31</sup> the Bureau did not disregard the contract and did not conclude that Paxson could elect mandatory carriage and remain subject to the retransmission consent agreement. Any contentions in that regard are properly brought before a court of competent jurisdiction to interpret the contract in question.

#### IV. ORDERING CLAUSES

10. Accordingly, **IT IS ORDERED**, pursuant to Sections 1.41, 1.43, and 1.102 of the Commission's rules, 47 C.F.R. §§ 1.41, 1.43, and 1.102, DIRECTV's Motion for Stay **IS DENIED**.

11. This action is taken pursuant to authority delegated by Section 0.283 of the Commission's rules, 47 C.F.R. § 0.283.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson  
Deputy Chief, Media Bureau

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<sup>31</sup> See DIRECTV Application for Review at 3.